Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - Appellant,

*versus*

Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - - Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee
Nashville Division

## JURISDICTIONAL STATEMENT

(See inside cover for list of attorneys)

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - - - *Appellant,*

*v.*

Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - - *Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

---

## JURISDICTIONAL STATEMENT

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Appellant appeals from the judgment of the United States District Court for the Middle District of Ten-

nessee, Nashville Division (three judges sitting), entered on March 12, 1975, as amended on April 21, 1975, denying injunctive relief against enforcement of a state statute relating to the assessment of properties and dismissing the case, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW

The opinion of the District Court for the Middle District of Tennessee, Nashville Division, has not been officially reported. A copy of the opinion is attached hereto as Appendix A.

## JURISDICTION

This suit was brought pursuant to 28 U.S.C. §§ 2201-2202 and pursuant to 28 U.S.C. § 2281 seeking an injunction restraining the action of state officials in the enforcement of a state statute prescribing equalization ratios to be applied in the assessment of railroad properties for ad valorem taxation in the State of Tennessee, the ground of challenge being that the said statute deprives Appellant of the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. The judgment of the District Court was entered on March 12, 1975, and amended on April 21, 1975. Notice of appeal was filed in the said District Court on May 9, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal



is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Georgia Railroad & Banking Co.* v. *Redwine, State Revenue Commissioner,* 342 U. S. 299 (1952); *Query* v. *United States,* 316 U. S. 486 (1942); *Herkness* v. *Irion, Commissioner of Conservation,* 278 U. S. 92 (1928).

## STATUTES INVOLVED

Constitution of Tennessee, Article II, Sec. 28. The pertinent text is set forth in Appendix B hereto.

Tennessee Code Annotated §§ 67-601(4), (7) and (8); § 67-611; § 67-616. The pertinent texts are set forth in Appendix C hereto.

A copy of the judgment below, and of the amendment thereto, are appended hereto as Appendix D.

A copy of the Notice of Appeal in this case is appended hereto as Appendix E.

## QUESTIONS PRESENTED

1. On the facts of the case, do sufficient relevant differences, having a fair and reasonable relation to the division of the ad valorem tax burden, exist to justify taxation of railroad property on the basis of a higher assessment ratio than is applied to industrial and commercial properties, as defined by the Tennessee statute, without depriving the railroad of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Do the Order and Opinion entered in this case sufficiently contain Findings of Fact to comply with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Did the Court below err in concluding that the complaint of Appellant is a matter solely for legislative concern and that for the Court to grant the relief requested "would take the Court outside the confines of judicial review," causing it to substitute its judgment for that of the Tennessee General Assembly?

## STATEMENT OF THE CASE

Subsequent to court decisions finding that disproportionate taxation of the properties of railroads violated the Tennessee constitutional requirement of uniformity, the Tennessee Constitution was amended to establish four classes of property for ad valorem taxation purposes, i.e., public utility (to be equalized at 55% of value of real and personal property), commercial and industrial (to be equalized at 40% of value of real property and at 30% of value of personal property), residential (to be equalized at 25% of value of real property and 5% of value of personal property) and farm (to be equalized at the same ratios as residential property). (Appendix B). The Tennessee General Assembly then enacted legislation in implementation of the constitutional amendment, placing railroads in the classification of public utility property (Appendix C). Appellant duly challenged classification of its property as public utility property, the challenge was rejected by the assessing body, and



Appellant instituted this litigation, contending that the actions of the Tennessee General Assembly in classifying railroads as public utilities for property tax purposes and of the assessing bodies in assessing Appellant's properties within that category, rather than their being included within the classification of industrial and commercial property, were arbitrary and unreasonable and a denial to Appellant of that equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Evidence in the case demonstrates that conditions which formerly were held to justify separate property tax treatment of railroads no longer exist; that there are no such special conditions today; and that it is, therefore, arbitrary and unreasonable to classify railroads for that purpose separately from other non-public utility commercial and industrial property.

The record below[1] discloses many changes in the situation of railroads in the past 45 to 50 years. It shows, for example, that in 1929, 75% of all ton-miles of freight transported in the United States were carried by rail whereas by 1973, that percentage had dropped to less than 40% (I Tr. 11). It shows that in the days when discriminatory taxation of railroads was being upheld by the courts, the railroads had a virtual monopoly on intercity passenger traffic, but that rail

[1]There are three parts to the transcript: I, testimony taken in open court; II, Appellant's depositions; and III, Appellee's depositions. References are identified by reference to parts and page, *e.g.*, I Tr. 1. The prepared statement of Witness Frye was stipulated as his direct testimony. References thereto are in the following manner: "Frye, 1", meaning Frye statement, page 1.

passenger traffic has diminished from 34,000,000 passenger-miles in 1929 to 9,000,000 in 1973 (I Tr. 11).

Since 1945, the ton-miles generated by motor carriers in the United States have increased four times and the tonnage carried by water carriers has also increased four times but railroads' tonnage has dropped from 67.2% of the total to 38.2% of the total (II Tr. 90-91). This competition with which railroads are engaged is pervasive and reaches almost all commodities which could be carried by rail.

In Tennessee there are three major railroads and perhaps 20 smaller ones; they compete with approximately 2,000 truck lines and the competition extends into all parts of the State (III Tr. 140) . This is to be contrasted, in Tennessee, with fewer than 100 natural gas distribution companies, each of which has a monopoly within the territory assigned to it (III Tr. 142); with electric companies, which have a monopoly on the provision of electricity within the particular territory (III Tr. 145-146); and with the telephone industry where there is monopoly within the service territory and where one company owns about 85% of the telephones in the State (III Tr. 156).

Such factors as these cause railroads to have a much greater risk as investments than is the case with public utilities (II Tr. 85), thus further differentiating them from public utilities.

The receipt of substantial benefits and subsidies from the government is no longer limited to the railroad industry, as was alleged many years ago when classification of railroads was being upheld. Fran-



chises and special benefits are pervasive throughout the commercial and industrial field. For example, radio stations and television stations in Tennessee are classified as commerical and industrial property for purposes of ad valorem taxation (Appendix C); yet they possess exclusive franchises with respect to certain channels of communication. Tennessee offers many benefits, advantages and subsidies to non-railroad industries generally to induce them to locate within the State. An example is found in the availability of tax-free financing for the construction of plants on land acquired for the industry at public expense, often through the use of the public power of eminent domain. Lower interest rates available to governmental agency borrowers redound to the benefit of the industry through reduced rental payments. The result is a substantial cost saving to private industry, financed by the public in the form of higher taxes on other property to offset the lower taxes or tax-free situation of the new industry (III Tr. 168-170).

The power of eminent domain is available to a great variety of industrial and commercial enterprises (Frye, 5-6). Through the use of the power, downtown areas have been acquired by governmental corporations, cleared, and sold to private commercial and industrial firms. Usually the private purchaser would have been unable to acquire the property, and certainly not at the price available to the public agency through the power of eminent domain. The practical result is the same as if the power of eminent domain had been possessed by the ordinary industrial or com-

mercial establishment. It has benefitted directly from the ouster of the previous owner and the taking of his property.

The era when railroads were generators of large streams of income has long since vanished. Railroads, as a whole, have not earned as much as 4% on net investments since 1955 (I Tr. 12). A study of some 45 industries showed that the railroads earned the lowest return of all, 2.9% in 1972 and 3.5% in 1973 (II Tr. 78). Thus, railroads are the least able to bear excessive burdens of government which, in another time, were justified as being imposed upon railroads because of their productivity and of their alleged ability to bear a disproportionate part of the burden of government.

An argument advanced for classification of railroads for disproportionate ad valorem taxation has been that they allegedly are relatively great burdens upon society. But the record demonstrates, for example, the relatively low pollution by railroads as compared with other sources. For instance, railroads produce 0.5% of particulates placed in the air, while non-transportation industrial sources place 87.5% in the air (II Tr. 5).

Railroads are energy-conserving, moving three times as much freight per gallon of fuel as do big trucks (Frye, 33), and their safety record as a carrier of passengers far surpasses that of other modes of transportation (II Tr. 4-5) . The land area consumed by highways is many times that used by the railroads, and railroads are not a depletive industry producing from a non-replenishable source.



Through Witness Frye, Appellant showed that the evidence applied not only to the railroad industry in general but also to Appellant, in particular, in Tennessee.

The record below establishes the absence of any correlation between the characteristics of railroads, including Appellant, their position in the economy and society, and the extraordinary burden placed upon them by virtue of the action of the Tennessee legislature. It shows that in the significant respects, the characteristics of railroads are those of non-utility industrial and commercial concerns and not those of public utilities which, for example, possess effective monopolies and the near-guaranteed rates of return which result from such a monopoly. Railroads no longer possess those "distinctive characteristics and functions" which must be found to exist before classification may be sustained. *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573 (1938).

## THE QUESTIONS ARE SUBSTANTIAL

Appellant brought this suit to contest action of the Tennessee legislature and of the assessing bodies in classifying properties of Appellant and other railroads in Tennessee with public utilities, rather than with other commercial and industrial properties, for the purpose of ad valorem taxation. The practical result of the legislature's action is to cause the real property of Appellant in Tennessee to be taxed at a level 37.5% greater than the level at which the real property of

non-railroad, non-public utility industrial and commercial concerns in Tennessee is taxed, and at an even greater disproportion in respect of personal property.

The case is of national significance. Appellant challenges here a practice which extends throughout the United States. Appellant believes that every major railroad in the country operates in more than one state which discriminates against railroads in its ad valorem tax system. The Senate Committee on Commerce concluded in 1972 that the discrimination amounted to at least $54 million in 1970. SENATE COMMITTEE ON COMMERCE, DISCRIMINATORY STATE TAXATION OF INTERSTATE CARRIERS, S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972).

This challenge is brought after years of change in the economic position of the railroads, culminating in the current situation of railroad bankruptcies in the Northeast and Midwest. One of the economist witnesses in this proceeding listed three factors which, in his opinion, are responsible for the financial decline of railroads. One of those factors was discriminatory state and local property taxation (II Tr. 98-99).

The record in this case demonstrates that there is no rational relationship between the characteristics and economic condition of Appellant and the object of the legislation complained of, namely, the proper distribution of the burden of taxation, to justify the classification of Appellant and the railroads for disproportionate property taxation.

Classification must "rest on real and not feigned differences . . . [T]he distinction [must] have some



relevance to the purpose for which the classification is made, and . . . the different treatments [must] be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1953).

Classification must be upon a reasonable ground, some difference which bears a just and proper relation to the attempted classification, and arbitrary selection can never be justified by calling it classification. *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150 (1897). All persons similarly circumstanced must be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412 (1920).

This discriminatory taxation of railroad property has attracted the concern of successive Congresses and national administrations. Under both Presidents Nixon and Ford, legislative proposals have been made to forbid such discrimination. See, *e.g.,* Title II, H. R. 5385, 93rd Cong., 2d Sess. (1974); H. R. 12891, 93rd Cong., 2d Sess. (1974); S. 1876, 94th Cong., 1st Sess. (1975), and President Gerald Ford's Message to Congress sending the Railroad Revitalization Act, H. R. Doc. No. 94-155, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. H 4212 (daily ed. May 19, 1975), in which the matter of discriminatory state property taxation is specifically mentioned.

This case, therefore, involves questions of broad significance to the country as it undertakes to deal with multiple railroad reorganizations and with legislative proposals to prevent further deterioration within the industry.

An example of that significance may be seen in the fact that if federal loans or grants were made to railroads, as is presently being proposed, Congress would be, in effect, providing funds to make up for money discriminatorily and unconstitutionally (if Appellant is correct about the law) taken away by states and localities in the form of property taxes—money which, if not so unconstitutionally exacted, would have reduced or eliminated the need for federal assistance.

The conflict between congressional exercise of the commerce powers in furtherance of a National Transportation Policy and discriminatory state action in plain contradiction of that congressional purpose merits the analysis of this Court.

The case is additionally important because it presents questions of the proper application of Rule 52(a) of the Federal Rules of Civil Procedure, requiring findings of fact, and of earlier decisions of this Court exemplified by *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935).

The District Court's comments on the evidence are limited to a few lines:



> "At best, the Plaintiff's proof, although voluminous, tends to show only that railroads in general are not as profitable as before and that certain benefits and powers peculiar to them, such as the right of eminent domain, are not as useful or as used as they once were . . . Given the characteristics of railroads, it was of course eminently reasonable for the General Assembly to designate railroads as public utilities; and the economic condition of the railroad industry and its competition with others does not destroy such designation as being palpably arbitrary or invidiously discriminatory." (Appendix A, pp. 25-26)

The foregoing is the extent of the lower court's treatment of the evidence, which filled some 400 pages of typed depositions and well over 100 pages of written statements submitted as direct testimony.

In what ways the lower court believed railroads to resemble telephone, water, and electricity companies, those organizations most frequently springing to mind when one uses the words "public utilities"; what the court thought to be the characteristics of a public utility and what the characteristics of a non-public utility; in what ways the court thought railroads to resemble non-utility industrial and commercial concerns; what the court thought to be the governing characteristics for application of that reasonable discretion which the legislature must exercise in making its classifications; and whether the court decided that circumstances had not changed, or, though changed, did not establish invidious discrimination—these, and many other questions, are left without findings and unanswered.

Compliance with Rule 52(a) is mandatory. *Featherstone* v. *Barash,* 345 F. 2d 246 (10th Cir., 1965); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405 (10th Cir., 1963); *Kweskin* v. *Finkelstein,* 223 F. 2d 677 (7th Cir., 1955). Yet the opinion of the court below is bereft of vital findings of fact, either subsidiary or ultimate. *O'Neill* v. *United States,* 411 F. 2d 139 (3rd Cir., 1969).

The question before the court below was one of fact, namely, have the characteristics of the railroads so changed in the years since the inception of their being treated separately or as public utilities for property tax classification purposes as to make it unreasonable to continue so to characterize and treat them rather than as other commercial and industrial enterprises? The precedents holding that reasonable classifications by the legislature will be sustained necessarily turned upon their facts. The burden which Appellant assumed in undertaking to show that present facts are sufficient to dictate a departure from the decisions upholding such discriminatory classifications is a substantial one and makes doubly important the fulfillment by the lower court of its duty of finding the facts. Judge Frank's comments in *United States* v. *Forness,* 125 F. 2d 928 (2nd Cir., 1942), at p. 942 are apposite:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."



To support conclusory determinations, ". . . there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated." *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 420 (1943). "A conclusion of ultimate fact without any subsidiary or basic findings of fact upon which such conclusion is based is insufficient compliance with Rule 52(a)." *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405, 406 (10th Cir., 1963).

"Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. . . . Otherwise, their findings are useless for appellate purposes." *Dalehite* v. *United States,* 346 U. S. 15, 24, n. 8.

It is not the function of the reviewing court to pore over the record below to answer questions such as those mentioned above, *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 421-422 (1943); *B. F. Goodrich Co.* v. *Rubber Latex Products, Inc.,* 400 F. 2d 401 (6th Cir., 1968); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405 (10th Cir., 1963), and cases cited therein. That is the function of the trial court.

The purpose of Rule 52(a) is threefold—findings of fact are an aid to the trial court's process of adjudication and evoke care in that process; they make definite what is decided in order to apply the doctrines of *res judicata* and estoppel; and they are an aid to the appellate court on review. *Featherstone* v. *Barash,* 345 F. 2d 246 (10th Cir., 1965); 5A Moore's Federal Practice 2706, ¶ 52.06[1]; Rule 52, Fed. R. Civ. P., Notes of Advisory Committee.

None of these purposes has been served in this case. Appellant believes that proper disposition of this case rests upon a careful, thoughtful and almost "clean-slate" analysis and exposition of facts as they exist today, comparing them with facts which existed 40 and 50 years ago. Such process can only be the slow and deliberate one of finding just what the facts of today are and of comparing them with yesterday's facts. Yet the opinion below has none of those findings of facts which would have resulted from this vital process.

The opinion below is, with all respect to the court below, of no significant value in respect of *res judicata* and estoppel by judgment. There being no findings of fact, it cannot be known in the future whether other like contests can be progressed or not.

Lastly, the Supreme Court, which is the first and last level of review in this instance, is confronted with no findings to aid it in its process of review, no findings which suggest to it the process by which the trial court reached its conclusions as to the impact of the evidence. The Supreme Court has said that it is particularly important that the trial court find the facts when there is a direct appeal to the Supreme Court:



> ". . . [Findings of fact are] an essential aid to the appellate court in reviewing an equity case [citations omitted] and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court."
>
> *Interstate Circuit, Inc.* v. *U. S.,* 304 U. S. 55, 56-57 (1938).

Lastly, Appellant believes that the opinion below represents a misconception of the breadth of the court's reach. In saying that—

> "[T]he Plaintiff's case is one for the legislature, and its economic arguments are more appropriately addressed to that body, for to grant the relief requested in this case would take the Court outside the narrow confines of judicial review and would, in effect, substitute its judgment for that of the Tennessee General Assembly" (Appendix A, p. 26),

the court below ignored the rule that changed conditions may render invalid that which once was valid and that in such circumstances the court may intervene to protect against arbitrary or unreasonable action and deprivation of constitutional rights. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405 (1935). In essence,

its position seems to be that legislative rejection of economic arguments, in enacting legislation, cannot raise constitutional objections reviewable in the courts. This is clearly erroneous.

The similarity of that case to the present one is striking. Plaintiff there alleged that changed conditions made invalid a statute valid when enacted, 294 U. S. at 414; Appellant alleges that changed conditions make invalid the application to it of precedents decided in quite different factual contexts. The Tennessee Supreme Court in *Walters* had held the questioned statute constitutional upon its face, 294 U. S at 414; the lower court in this case found the Tennessee classification scheme in the state constitution and the legislative determination as to the classification of railroads as public utilities "not unconstitutional on its face" (Appendix A, p. 24). The Tennessee Supreme Court in *Walters* found that it could not then decide whether "changed economic and transportation conditions" rendered the act burdensome or unreasonable, 294 U. S. at 414; the court below said that Appellant's evidence of changed economic and transportation conditions must be addressed to the legislature and for the court to act upon them would take the court beyond its proper role (Appendix A, p. 26).

Of the understanding of the Tennessee Supreme Court, this Court said, in *Walters:* "A rule to the contrary is settled by the decisions of this court," 294 U. S. at 415, and that unless the evidence were of such a nature that it "could not conceivably establish" that the State's action complained of was arbitrary and unreasonable, there was error in refusing to consider the evidence. 294 U. S. at 215-216. The case was remanded for further proceedings below. Such a disposition would be appropriate in this case. The evidence in the record is of too great a volume and too high a quality for it to be said that it "could not conceivably establish" that Tennessee's action in classifying Appellant was arbitrary and unreasonable.



## CONCLUSION

It is evident from the above that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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## APPENDIX A

IN THE

# UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| | |
|---|---|
| LOUISVILLE & NASHVILLE RAILROAD COMPANY<br>*v.*<br>Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners Composing the Tennessee Public Service Commission;<br>HONORABLE RAY BLANTON, Governor of the State of Tennessee;<br>HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;<br>HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;<br>ALICE T. STEELE, Trustee of Dickson County, Tennessee; and<br>DICKSON COUNTY, TENNESSEE | **Civil No. 6962** |

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**OPINION**—Entered March 12, 1975

Before: WILLIAM E. MILLER, Circuit Judge, FRANK GRAY, JR., Chief District Judge, and L. CLURE MORTON, District Judge.

GRAY, Chief District Judge. In 1972, the Tennessee electorate ratified an amendment to Article II, Section 28 of the Tennessee constitution, which amendment (popularly

known as Question 3) provided, *inter alia*, for the sub-classification of real property into four classes and of tangible personal property into three classes for ad valorem tax purposes. Under this amendment, real property is to be assessed as follows: "Public Utility" property at fifty-five percent (55%) of its value; "Industrial and Commercial" property at forty percent (40%) of value; and both "Residential" and "Farm" property at twenty-five percent (25%) of value. Tangible personal property is to be assessed at a fifty-five percent rate for "Public Utility" property, thirty percent for "Industrial and Commercial" property, and five percent for all other tangible personal property. By its terms, the amendment took effect on January 1, 1973, and the constitutionality, under the Tennessee constitution, of the process by which this amendment was proposed and ratified has been upheld by the Tennessee Supreme Court. *Southern Railway Company* v. *Fowler*, 497 S. W. 2d 891 (Tenn. 1973).

To implement the provisions of the constitutional amendment, the Tennessee General Assembly enacted Chapter 226 of the Public Acts of 1973, codified as Chapter 67, Tennessee Code Annotated, and, as part of this legislation, railroad property was placed in the "Public Utility" sub-classification. T.C.A. § 67-601. Although the instant proceeding began as an attack on the amendment to Article II, Section 28, the parties, through briefs and stipulations, have narrowed the litigation to an attack on the General Assembly's designation of railroad property as "Public Utility," rather than "Industrial and Commercial," *e.g.*, an attack on the applicable portion of T.C.A. § 67-601.[1] The gist of

[1]In its "Reply Brief," the plaintiff attempted to retreat somewhat from this position, saying that it was still contending that the amendment could be held unconstitutional, as applied to railroads. This position, however, is untenable in that application to railroads is only through the statute in question, T.C.A. § 67-601, and, therefore, the scope of the principal issue is not broadened thereby.



the plaintiff's claim is that, in placing the railroads in the "Public Utility" sub-classification instead of in "Industrial and Commercial," the Tennessee Legislature acted arbitrarily and unreasonably and, thus, in violation of the Fourteenth Amendment to the Constitution.

By amendment to its complaint dated April 3, 1974, plaintiff has named as additional defendants Alice T. Steele, Trustee of Dickson County, Tennessee, and Dickson County, Tennessee, and seeks refund of certain taxes paid to Dickson County, which taxes were based on an assessment made under the statute under attack.

Before reaching the issues, however, there must first be dealt with the jurisdictional arguments interposed by the defendants, *i.e.*, that 28 U.S.C. § 1341 is a bar to this court's jurisdiction.[2] This contention is easily disposed of because the nature of this action and of the statute under attack take the case outside the purview of Section 1341. *See: Hargrave* v. *McKinney*, 413 F. 2d 320, 325-327 (5th Cir. 1969).

It follows that this same jurisdictional objection to the action against Dickson County is likewise without merit.

Turning to the merits, we begin with the well established propositions that the classification of property for purposes of taxation by the states does not offend the Fourteenth Amendment and that the states may impose higher rates on some kinds of property, specifically railroads, than on others.

> "That the states may classify property for taxation; may set up different modes of assessment, valuation, and collection; may tax some kinds of property at higher rates than others; and in making all these dif-

[2]28 U.S.C. § 1341 is as follows: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

ferentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law." *Nashville C. & St. L. Railway* v. *Browning*, 310 U. S. 362, 368 (1940).

The foregoing principles have been followed as recently as 1973, in the case of *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). It is clear, therefore, that the classification scheme embodied in the amendment to Article II, Section 28 is permissible under the Fourteenth Amendment, and that the legislative determination that railroads are public utilities and may be placed in the highest classification is not unconstitutional on its face.

The plaintiff seeks to avoid the seemingly overwhelming weight of precedent by asserting, under the authority of *Nashville C. & St. L. Railway Co.* v. *Walters*, 294 U. S. 413 (1935), that the change of conditions in the railroad industry has rendered invalid the factual basis of the *Browning* decision and, therefore, Tennessee's classification of railroads in the highest category. In other words, the plaintiff would have this Court apply the principles enunciated in *Browning* and related cases, but reach a different result based on allegedly different facts. Ironically, a similar argument was also made in *Browning* in connection with the Due Process issue. *Nashville C. & St. L. Railway* v. *Browning, Supra*, at p. 370.

In order for a change of circumstances to invalidate this enactment, however, the plaintiff must show that these circumstances render the difference in treatment by the State of Tennessee invidiously discriminatory. *Lehnhausen* v. *Lake Shore Auto Parts Co., Supra*, at p. 359; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, at p. 666 (1966). In this regard, it is to be noted that the states have great



leeway, where taxation is concerned, in making classifications.

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526-527 (1959).

Viewed against this backdrop, the plaintiff's case falls far short of establishing that Tennessee's classification of railroad property as Public Utility property is "palpably arbitrary." *See: Lehnhausen* v. *Lake Shore Auto Parts Co., Supra.*

At best, the plaintiff's proof, although voluminous, tends to show only that railroads, in general, are not as profitable as before and that certain benefits and powers peculiar to them, such as the right of eminent domain, are not as useful or as used as they once were. This evidence, however persuasive and appropriate it might be if presented to a legislative body, simply does not sustain the plaintiff's claim of invidious discrimination. Given the characteristics

of railroads, it was of course eminently reasonable for the General Assembly to designate railroads as public utilities; and the economic condition of the railroad industry and its competition with others does not destroy such designation as being palpably arbitrary or invidiously discriminatory. It certainly cannot be said, on the basis of this record, that the designation complained of here was without basis. In essence, the plaintiff's case is one for the legislature, and its economic arguments are more appropriately addressed to that body, for to grant the relief requested in this case would take the Court outside the narrow confines of judicial review and would, in effect, substitute its judgment for that of the Tennessee General Assembly.

Having thus found that neither the amendment to Article II, Section 28 of the Tennessee constitution nor T.C.A. § 67-601 is violative of the plaintiff's Fourteenth Amendment rights, the Court must deny all relief prayed herein.

An appropriate Order will be entered.



## APPENDIX B

### CONSTITUTION OF TENNESSEE
### ARTICLE II

**Sec. 28. Taxable property—Valuation—Rates.**—In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) per cent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) per cent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) per cent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) per cent of its value.

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities or Towns; provided, that such tax relief for the years 1973 through 1977 shall be not less than an amount equal to the State, County, and Municipal Taxes on Five Thousand ($5,000) Dollars worth of the full market value (or One Thousand Two Hundred Fifty ($1,250) Dollars of the assessed value) of property used for a residence by any taxpayer over sixty-five (65) years of age for a period of one (1) year prior to the date of assessment; provided further, that such relief shall not extend to persons having a total annual income from all sources in excess of Four Thousand Eight Hundred ($4,800) Dollars.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) per cent of its value;

(b) Industrial and Commercial Property, to be assessed at thirty (30%) per cent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) per cent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and



shall provide fair and equitable methods of apportionment of the value of same to this State for purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ratio of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redeemable or cash value of all of their outstanding shares of capital stock, policies of insurance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. The portion of a Merchant's Capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973. 1 Tenn. Code Anno., 1974 Cum. Supp. 98.

## APPENDIX C

**Tennessee Code Annotated Sec. 67-601. Definitions.**—For purposes of classification of property:

* * * * * * *

(4) "Commercial and industrial tangible personal property" is hereby defined to include personal property such as goods, chattels and other articles of value which are capable of manual or physical possession, and machinery and equipment which is (1) used essentially and principally for the commercial or industrial purposes or processes for which it is intended and (2) if affixed or attached to real property, can be detached without material injury to such real property.

* * * * * * *

(7) "Public utility property" is hereby defined to include all property of every kind, whether owned or leased, and used, or held for use, directly or indirectly in the operation of a public utility, which shall include but not necessarily be limited to the following business entities, whether corporate or otherwise: (1) railroad companies; (2) telephone, radio common carriers and telegraph companies; (3) passenger, sleeping, freight and private car companies which is hereby defined as any business, other than a railroad company, which owns, uses, furnishes, leases, rents or operates to, from, through, in or across this state or any part thereof any kind of railroad car, including but not necessarily limited to, flat, tank, refrigerator, passenger, or similar type cars; (4) street car companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies; (11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit



from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) taxicab, transit and limousine companies; (13) commercial air carrier companies holding a certificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration, or any other federal or state regulatory agency; excepting those companies whose operations are solely chartered operations; and (14) water transportation carrier companies which operate boats and barges over the waterways of this state for hire and which hold a certificate of convenience and necessity as common carriers from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency.

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property." 12 Tenn. Code Anno., 1974 Cum. Supp. 41.

* * * * * * *

**Tennessee Code Annotated Sec. 67-611. Real property—Classification and rate of assessment.**—For the purposes of taxation, all real property, except vacant or unused property or property held for use, shall be classified according to use and assessed as hereinafter provided:

a. Public utility property—Public utility property shall be assessed at fifty-five per cent (55%) of its value.

b. Industrial and commercial property—Industrial and commercial property shall be assessed at forty per cent (40%) of its value.

c. Residential property—Residential property shall be assessed at twenty-five per cent (25%) of its value.

d. Farm property—Farm property shall be assessed at twenty-five per cent (25%) of its value.

Where a parcel of real property is used for more than one purpose which would result in different subclassifications and different assessment percentages, then it shall be apportioned among the subclasses according to guidelines established by rules and regulations of the state board of equalization.

All real property which is vacant, or unused, or held for use, shall be classified according to its immediate most suitable economic use, which shall be determined after consideration of: (1) immediate prior use, if any; (2) location; (3) zoning classification; provided, however, that vacant subdivision lots in incorporated cities, towns, or urbanized areas shall be classified as zoned, unless upon consideration of all factors, it is determined that such zoning does not reflect the immediate most suitable economic use of the property; (4) other legal restrictions on use; (5) availability of water, electricity, gas, sewers, street lighting, and other public services; (6) size; (7) access to public thoroughfares; and (8) any other factors relevant to a determination of the immediate most suitable economic use of the property. If, after consideration of all such factors, any such real property does not fall within any of the foregoing definitions and classifications, such property shall be classified and assessed as farm or residential property. 12 Tenn. Code Anno., 1974 Cum. Supp. 50.

* * * * * * *



**Tennessee Code Annotated Sec. 67-616. Tangible personal property—Classification and rate of assessment.**—For purposes of taxation, all tangible personal property, except inventories of merchandise held by merchants and businesses for sale and exchange by persons taxable under § 67-5801 et seq., and unused tangible personal property shall be classified according to its use and assessed as follows:

a. Public utility property—Public utility property shall be assessed at fifty-five per cent (55%) of its value.

b. Industrial and commercial property—Industrial and commercial property shall be assessed at thirty per cent (30%) of its value.

c. All other tangible personal property—All other tangible personal property shall be assessed at five per cent (5%) of its value. All tangible personal property which is not in use shall be classified according to its immediate most suitable economic use which shall be determined after consideration of the following:

(1) immediate past use, if any;
(2) nature of the property;
(3) classification of the real property upon which it is located;
(4) normal use of the property;
(5) ownership;
(6) any other factors relevant to a determination of the immediate most suitable economic use of the property. 12 Tenn. Code Anno., 1974 Cum. Supp. 53.

## APPENDIX D

IN THE

# UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| | |
|---|---|
| LOUISVILLE & NASHVILLE RAILROAD COMPANY<br>*v.*<br>Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners Composing the Tennessee Public Service Commission;<br>HONORABLE RAY BLANTON, Governor of the State of Tennessee;<br>HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;<br>HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;<br>ALICE T. STEELE, Trustee of Dickson County, Tennessee; and<br>DICKSON COUNTY, TENNESSEE | **Civil No. 6962** |

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**ORDER**—Entered March 12, 1975

In accordance with the opinion contemporaneously filed herewith, it is ORDERED that this case be, and it is hereby, DISMISSED.

FOR THE COURT:
(s) Frank Gray, Jr.
Chief District Judge



IN THE

# UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| | |
|---|---|
| LOUISVILLE & NASHVILLE RAILROAD COMPANY<br>*v.*<br>Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners Composing the Tennessee Public Service Commission;<br>HONORABLE RAY BLANTON, Governor of the State of Tennessee;<br>HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;<br>HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;<br>ALICE T. STEELE, Trustee of Dickson County, Tennessee; and<br>DICKSON COUNTY, TENNESSEE | **Civil No. 6962** |

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**AMENDED ORDER**—Entered April 21, 1975

In accordance with the opinion filed in this cause on March 12, 1975, it is ORDERED, in lieu of the Order entered on March 12, 1975, that in accordance with said opinion of March 12, 1975 injunctive relief prayed for is DENIED and the case is hereby DISMISSED.

FOR THE COURT:
(s) Frank Gray, Jr.
Chief District Judge

## APPENDIX E

IN THE

# UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

---

| | |
|---|---|
| LOUISVILLE & NASHVILLE RAILROAD COMPANY<br>*v.*<br>Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners Composing the Tennessee Public Service Commission;<br>HONORABLE RAY BLANTON, Governor of the State of Tennessee;<br>HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;<br>HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;<br>ALICE T. STEELE, Trustee of Dickson County, Tennessee; and<br>DICKSON COUNTY, TENNESSEE | **Civil No. 6962** |

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**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**—Filed May 9, 1975

Notice is hereby given that Louisville & Nashville Railroad Company, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order, entered in this action on March 12, 1975, as amended



by amended order entered in this action on April 21, 1975, denying injunctive relief and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1253.

(s) Philip M. Lanier By Harlan Dodson, Jr.
Philip M. Lanier
908 West Broadway
Louisville, Kentucky 40201

Hooker, Keeble, Dodson & Harris
By: (s) Harlan Dodson, Jr.
900 Nashville, Trust Building
Nashville, Tennessee 37201
Attorneys for Plaintiff

PROOF OF SERVICE

I, Harlan Dodson, Jr., one of the attorneys for Louisville & Nashville Railroad Company, Appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of May, 1975, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On Messrs. Z. D. Atkins, Robert Clement, Cayce Pentecost, Ray Blanton, Joe C. Carr, and Randolph A. Ashley, Jr., by leaving a copy thereof at the office of Everett H. Falk, Esquire, at 208 Supreme Court Building, Nashville, Tennessee, and at the office of Eugene Ward, Esquire, at Room C1-100, Cordell Hull Building, Nashville, Tennessee; and upon Defendants Alice T. Steele and Dickson County, Tennessee, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid, to Ray Stuart, Esquire, Dickson, Tennessee 37055. Further such service constitutes service upon all parties required to be served.

This 9th day of May, 1975.

(s) Harlan Dodson, Jr.

## PROOF OF SERVICE

I, Philip M. Lanier, one of the attorneys for Louisville and Nashville Railroad Company, Appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of July, 1975, I served copies of the foregoing Jurisdictional Statement in the Supreme Court of the United States on the several parties thereto, as follows:

On Messrs. Z. D. Atkins, Robert Clement, Cayce Pentecost, Ray Blanton, Joe C. Carr, and Randolph A. Ashley, Jr., by mailing 3 copies thereof to Everett H. Falk, Esquire, at 208 Supreme Court Building, Nashville, Tennessee, and 3 copies to Eugene Ward, Esquire, at Room C1-100, Cordell Hull Building, Nashville, Tennessee; and upon Alice T. Steele and Dickson County, Tennessee, by mailing 3 copies, in a duly addressed envelope, with first-class postage prepaid, to Ray Stuart, Esquire, Dickson, Tennessee 37055. Further such service constitutes service upon all parties required to be served.

This 3rd day of July, 1975.

---

PHILIP M. LANIER

SUPREME COURT, U. S.
FILED
JUL 31 1975
MICHAEL ROBAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
*Appellant*,

*v.*

Z. D. ATKINS, ET AL.,
*Appellees*.

*On Appeal from the United States District Court*
*for the Middle District of Tennessee*
*Nashville Division*

## MOTION TO AFFIRM

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7-29-75-51

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
*Appellant*,

*v.*

Z. D. ATKINS, ET AL.,
*Appellees*.

*On Appeal From the United States District Court*
*for the Middle District of Tennessee*
*Nashville Division*

## MOTION TO AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees respectfully move the Court to affirm the judgment of the United States District Court for the Middle District of Tennessee on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE CLASSIFICATION OF RAILROAD PROPERTY AS "PUBLIC UTILITY PROPERTY" FOR PURPOSES OF PROPERTY TAXATION RATHER THAN AS "INDUSTRIAL AND COMMERCIAL PROPERTY" IS WELL WITHIN THE RANGE OF A STATE'S DISCRETIONARY POWER TO ESTABLISH CLASSIFICATIONS IN THE LAYING OF TAXES.

A long line of authorities provided by this Honorable Court establishes that classifications for purposes of taxation are permissible under the equal protection clause of the Fourteenth Amendment; that the states have broad power to establish tax classification schemes; and that such classification schemes must be palpably arbitrary or invidiously discriminatory resting on no reasonable consideration of difference or policy before they will be deemed to offend the equal protection clause. *E.g., Kahn v. Shevin*, 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *State Board of Tax Comm'rs v. Jackson*, 283 U.S. 527 (1931); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910).

The scope of the discretion permitted the states under the equal protection clause in establishing tax classification schemes was recently restated by Mr. Justice Douglas, speaking for a unanimous Court in *Lehnhausen v. Lake Shore Auto Parts Co., supra*:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals different from the others. The test is whether the difference in treatment is an invidious discrimination . . . Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation . . ."
>
> 410 U.S. at 359.



The breadth of the leeway allowed the states in the area of taxation is also reflected in this Court's decision in *Allied Stores of Ohio v. Bowers, supra*, wherein it was held that a state, in establishing tax classifications, "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." 358 U.S. at 527.

Article 2, Section 28 of the Tennessee Constitution prescribes four subclassifications of real property for property tax purposes: (a) Public Utility Property, to be assessed at 55% of its value; (b) Industrial and Commercial Property, to be assessed at 40% of its value; (c) Residential Property, to be assessed at 25% of its value; and (d) Farm Property, to be assessed at 25% of its value. 1 Tenn. Code Ann., 1974 Cum. Supp. 98. This section of the Tennessee Constitution also provides for three subclassifications of tangible personal property for property tax purposes: (a) Public Utility Property, to be assessed at 55% of value; (b) Industrial and Commercial Property, to be assessed at 30% of value; and (c) All Other Tangible Personal Property, to be assessed at 5% of its value. 1 Tenn. Code Ann., 1974 Cum. Supp. 99. The legislature of the State of Tennessee, in establishing a reasonable system of taxation under the classifications prescribed in Article 2, Section 28 of the Tennessee Constitution, exercised its judgment and placed the property of railroads, along with the properties of other transportation companies, in the "public utility property" classification. Tenn. Code Ann.,

sec. 67-601 (7) (Cum. Supp. 1974). Railroads were not singled out from other transportation companies for discriminatory tax treatment, nor were they arbitrarily selected for inclusion in an altogether illusory classification.

Historically this Court has viewed railroads as having distinctive characteristics and functions in society which make permissible separate and differential tax treatment. *E.g.*, *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938); *Southern Railway v. Watts*, 260 U.S. 519 (1923). Although appellant has questioned the wisdom of classifying railroad property in a public utility property category in view of changing economic conditions, the legislature of Tennessee in exercising its discretionary power to establish classifications in the laying of taxes presumably was free to consider those factors historically relied upon as grounds for such classification.

II.

THE DISTRICT COURT'S DETERMINATION THAT THE APPELLANT'S EVIDENCE CONCERNING THE ECONOMIC CONDITION OF THE RAILROAD INDUSTRY DID NOT RENDER THE CLASSIFICATION OF RAILROAD PROPERTY PALPABLY ARBITRARY OR INVIDIOUSLY DISCRIMINATORY WAS JUSTIFIED.

Against a background which not only recognizes the broad power of a state to establish tax classifications but also permits the differential tax treatment of railroad property, appellant has attempted to support a position which runs counter to this background by asserting that changed circumstances and conditions have effectively repudiated the application of all the criteria announced by



the courts in the past as justifying such discriminatory classification for tax purposes. The District Court found that appellant's proof in support of its contention tended "to show only that railroads, in general, are not as profitable as before and that certain benefits and powers peculiar to them, such as the right of eminent domain, are not as useful or as used as they once were." (Appx. A to Appellant's Jurisdictional Statement, p. 25). In the District Court's view, economic evidence of this type does not show invidious discrimination and is properly addressed to the legislature to be weighed along with other considerations in determining a tax policy which will best serve the interests of the people. See generally *Apache County v. Atchison, T. & S. F. Ry. Co.*, 106 Ariz. 856, 476 P.2d 657 (1970), *appeal dismissed* 401 U.S. 1005.

Appellees maintain that the District Court's determination was eminently justified. To adopt appellant's position would more narrowly restrict the legislative power of the states by equating palpable arbitrariness and invidious discrimination with relative reasonableness. This position, in turn, would subject tax classifications to constitutional attack where it could be contended that one classification is more reasonable than another with respect to particular taxpayers or properties, and would thereby require state legislatures to place taxpayers and properties in the most reasonable classifications to avoid contravening the equal protection clause. Appellees maintain that the holdings of this Court, as exemplified by *Lehnhausen v. Lake Shore Auto Parts Co.*, 416 U.S. 351 (1974), and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), militate against a position which would require the substitution of judicial judgment for legislative judgment in reviewing state tax classifications.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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*Attorneys for Appellees*

Supreme Court, U. S.
FILED
AUG 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-14

---

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - Appellant,

*versus*

Z. D. ATKINS,
ROBERT CLEMENT, and
CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - Appellees.

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On Appeal from the United States District Court for the Middle District of Tennessee Nashville Division

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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(See inside cover for list of attorneys)

August 16, 1975

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1975**

**No. 75-14**

---

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - *Appellant,*

*v.*

Z. D. ATKINS,
ROBERT CLEMENT, and
CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County Tennessee; and
DICKSON COUNTY, TENNESSEE - - *Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellant submits this brief in opposition to Appellees' Motion to Affirm the Judg-

ment of the United States District Court for the Middle District of Tennessee, the ground for said Motion being that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## I

## THE QUESTIONS ARE SUBSTANTIAL

Appellant presented three questions to the Court. In paraphase they are:

1. Does the evidence establish that the classification action of the Tennessee General Assembly was arbitrary, capricious and unreasonable?

2. Did the District Court comply with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Did the District Court take an unduly limited view of its jurisdiction to review the action of the Tennessee General Assembly?

Appellant's Motion to Affirm is directed only to the first of the foregoing questions. Accordingly, this Brief will be similarly limited, without abandonment of the other questions.

In support of their argument, Appellees cite authorities recognizing the right of a state legislature to establish classifications. They suggest that the discretion possessed by the legislature in such a process is without limitation and that there may be no substitution of judicial judgment for legislative judgment in reviewing state tax classifications.



Adherence to such a position would foreclose the courts from examining legislative action or giving any remedy for it in case of an arbitrary or capricious exercise of legislative power. But this is exactly the authority which rests in the courts, for they are the traditional protection against arbitrary and capricious exercise of power by the legislature. Appellant seeks, at this time in this case, only the plenary consideration of this Court, with briefs on the merits and oral argument, so that what Appellant believes to be a new question in modern times may be presented in that manner to this Court.

In the context of jurisdiction, the Supreme Court has said that questions are unsubstantial only when they are obviously without merit or of such a nature that their "unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans* v. *Lavine,* 415 U. S. 528 (1974) at 536-7. Those standards are equally instructive here.

Clearly there is merit in Appellant's claim that the legislative action was arbitrary and capricious—much evidence was introduced to support that claim and the lower court accepted jurisdiction, recognizing a substantial federal question to be present. Previous decisions are not governing because, to the best of Appellant's research, no case since *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, decided in 1938 (and involving a different factual situation), has pre-

sented the Court with the question whether, *as a matter of fact,* a given legislative action in classifying railroads with public utilities for purposes of ad valorem taxation was arbitrary and capricious, and no case has presented the question of whether, given the classification structure established by the legislature and given the characteristics of railroads in modern-day society, it was arbitrary and capricious to classify railroads as other than commercial and industrial property, one of the classifications in the scheme. Granting of the Motion to Affirm will be construed by some to mean that a legislature may act without restraint in classifying railroads for purposes of ad valorem taxation. Appellant does not understand this to be the law.

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Unlike most of the cases which come to this Court, there has been consideration of the facts and of Appellant's arguments on the facts in only one forum, namely, that of the District Court. This is because the assessing authority considered itself precluded by the Tennessee statute from the exercise of any discretion, based upon the facts, as to the appropriate classification of railroads. A member of the assessing body testified that "we would have no discretion insofar as our treatment of it is concerned" (III Tr. 154-155). Thus, no evidence on appropriate classification was introduced before the assessing body and the only evidence in the case is that which was taken in the District Court proceeding. There has thus far, therefore,



been no review of the facts or of the conclusion reached on those facts by the only forum hearing them.

The result is that if plenary consideration is not granted by this Court, a subject of national significance and impact (please see Jurisdictional Statement, pages 10-11) will have been fully considered only once and then only on the briefs, for oral argument was not granted in the District Court.

Not even *Apache County* v. *Atchison, T. & S. F. Ry. Co.*, 106 Ariz. 856, 476, P. 2d 657 (1970), appeal dismissed 401 U. S. 1005, cited by Appellees in their Motion to Affirm, should foreclose plenary consideration. The taxpayers there sought, against the background of quite a different statute, to be classified with public service corporations rather than as a totally separate category. Appellant in this case alleges its practical identity with other forms of commercial and industrial enterprise rather than with public service corporations, and appears in the context of a markedly different classification scheme, one which renders the legislative action as to Appellant arbitrary and capricious.

## CONCLUSION

For the foregoing reasons, as well as because of its arguments in respect of the second and third questions presented in the Jurisdictional Statement, Appellant prays for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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## PROOF OF SERVICE

I, Philip M. Lanier, one of the attorneys for Louisville and Nashville Railroad Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of August, 1975, I served copies of the foregoing Brief in Opposition to Motion to Affirm in the Supreme Court of the United States on the several parties thereto, as follows:

On Messrs. Z. D. Atkins, Robert Clement, Cayce Pentecost, Ray Blanton, Joe C. Carr, and Randolph A. Ashley, Jr., by mailing 3 copies thereof to Everett H. Falk, Esquire, at 208 Supreme Court Building, Nashville, Tennessee, all in duly addressed envelopes with first-class postage prepaid; and upon Alice T. Steele and Dickson County, Tennessee, by mailing 3 copies, in a duly addressed envelope, with first-class postage prepaid, to Ray Stuart, Esquire, Dickson, Tennessee 37055. Further such service constitutes service upon all parties required to be served.

This 16th day of August, 1975.

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Philip M. Lanier